U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 07 May 2004

Case No.: 2004-AIR-19

In the Matter of

Coleen L. Powers,
Complainant

v.

Paper, Allied-Industrial, Chemical & Energy Workers Int'l Union (PACE),
Respondent

ORDER DISMISSING CLAIM

On April 14, 2004, I issued a Preliminary Order and Order to Show Cause, directing that the Complainant, within fifteen days, show cause as to why her complaint should not be dismissed for failure to state a cause of action under the AIR 21 Act, the Sarbanes-Oxley Act, the Comprehensive Environmental Response, Compensation and Liability Act, the Safe Drinking Water Act, the Solid Waste Disposal Act, the Federal Water Pollution Control Act, and the Toxic Substances Control Act.

The Complainant filed the following pleadings, some of which she also filed in connection with 2004 AIR 6 and other matters before the Administrative Review Board:

"Complainant's Motion for Recusal of ALJ Chapman in 2004-AIR-6 & 2004-AIR-19;"

"Complainant's Notice of Filing Proposed, Preliminary, Comprehensive Witness List {2003-AIR-12; ARB 04-035; 2004-AIR-6; ARB 04-066; 2004-AIR-19};" and

"Complainant's Supplement to Her April 15, 2004 Motion for Continuance of Hearing in 2004-AIR-6 Based Further on Receipt of ALJ's April 14, 2004 Order in 2004-AIR-19; Motion to Consolidate to Conserve Judicial Resources; Motion to Amend/Alter the Harmful Errors in the April 14, 2004 Order in 2004-AIR-19; Motion to ALJ to Properly Address the Conflict of Interests {Disqualify} & Prohibited Exparte Material Communications With Mr. Doug Hall and His Law Firm, Piper Rudnick, LLP in These Matters."

Among other requests for relief in these pleadings, including a request that the Court become competent in the law and conduct introspection, the Complainant "reserves her right" to request an extension of time to respond to my April 14, 2004 Order, and to supplement her motion. The time for filing a response to my April 14, 2004 Order has expired, and the Complainant has not exercised her "right" to request an extension, nor have I granted an extension to respond.

Nevertheless, despite the Complainant's failure to respond, I have carefully reviewed the Complaint that the Complainant filed with OSHA, to determine if it states a cause of action on which this Court may grant relief. But even under the most generous of interpretations, I find that the Complainant has not alleged any facts that if proven, would constitute a cause of action under any of the statutes that this Court may consider.

Initially, I note that the bulk of the Complainant's complaints deal with alleged wrongdoings and shortcomings of the Complainant's Union, PACE. For instance, the Complainant alleges that PACE failed to investigate and hold a hearing on the Complainant's grievance; that it refused to provide copies of documents to the Complainant; that union officials did not respond to the Complainant's requests; that union officials were not prepared, and were abrupt, rude, and discourteous. In her complaint, the Complainant requests that the NLRB investigate the alleged failure of PACE officials to competently represent union members, and order PACE to produce a copy of a mediation settlement agreement. The Complainant also alleges that the PACE President harbors resentment toward the Complainant, and has been rude and discourteous to her. The Complainant alleges that certain portions of the collective bargaining agreement violate FAA regulations.

The Complainant alleges that she was given a work assignment that was contrary to her seniority rights, in retaliation for serving discovery in a different proceeding, and that Pinnacle personnel were verbally abusive to her.

The Complainant alleges that she engaged in protected activity by attempting to schedule a meeting to try to resolve contractual grievances, and that a "named person" retaliated by verbally threatening a written warning. She characterized this activity as a "clear effort at restraint, and completely discriminatory for Ms. Powers' employee protected activities under the NLR Act, 29 CFR Part 1979, 29 CFR Part 1980, and 20 CFR Part 24."

The Complainant argues that "named persons" violated her civil rights, as well as her rights under the First and Fourth Amendments, and her rights to freedom of speech and property.

The Complainant alleges that "named persons" retaliated against her by denying her request to attend "NWA Emergency Response Plan Assist Volunteer training," and by overpaying her on several occasions.

The Complainant asks that the NLRB take action to halt union and company "retaliation, harassment, coercion, and restraints" against her for her protected activities in her pursuit of her contract grievance.

The Complainant also alleges that "named persons" violated various provisions of the Federal Aviation Administration rules and regulations.

DISCUSSION

This Court has no jurisdiction over allegations that involve the relationship between a union and its members or the interpretation of a collective bargaining agreement, nor does it have any jurisdiction over the activities of the National Labor Relations Board. Nor does this Court have the authority to adjudicate alleged violations of the rules or regulations of the Federal Aviation Administration. This Court has no authority to resolve claims of violations of civil or constitutional rights.

More importantly, nowhere in the Complainant's 46 page complaint does she allege facts that would conceivably support a finding that she engaged in any protected activity under the AIR 21 Act, the Sarbanes-Oxley Act, the Comprehensive Environmental Response, Compensation and Liability Act, the Safe Drinking Water Act, the Solid Waste Disposal Act, the Federal Water Pollution Control Act, and the Toxic Substances Control Act. Nor has she alleged that she suffered an "adverse employment action" as that term is defined in these statutes at the hands of PACE, the Respondent, or any of the other parties that she alleges are respondents, as a result of such activity.

The Complainant takes issue with the authority of the Court to dismiss a claim, defense, or party, claiming that the Court must first issue a Notice of Hearing to all Parties, and thereafter the Court may only act upon motion of one of the parties.1 The Complainant cites to 29 C.F.R Section 24.5(4) (it appears that she meant to cite to 24.6(4)) which deals with procedures for hearings in claims under the Energy Reorganization Act, and which indicates on its face that the ALJ may, on specified grounds, dismiss a claim at the request of any party, or *on his or her own motion*, i.e., sua sponte. Nevertheless, the Claimant argues that the Court may not issue a show cause order for dismissal of a claim except on the motion of a party.

Title 29 C.F.R. Section 18.29 deals with the authority of the administrative law judge. It provides, among other things, that an Administrative Law Judge may "take any appropriate action authorized by the Rules of Civil Procedure for the United States District Courts . . ."

Federal Rules of Civil Procedure 12(b)(6) provides that a party may move for

1 In her April 22, 2004 pleading, the Complainant also states that "An ALJ <u>is not</u> allowed pursuant to federal regulations to issue "Preliminary Orders"," claiming that only OSHA is allowed to issue "Preliminary Orders."

dismissal on the grounds that a complaint does not state a claim upon which relief can be granted. Although the Rule refers to such dismissal on the motion of a party, it has been uniformly held that a Court may dismiss a claim for failure to state a claim upon which relief can be granted when it is patently obvious that the claimant could not prevail on the facts as alleged in the complaint. Courts have the inherent power to take such action, or to find that a complaint is frivolous on its face. *See, Koch v. Mirza,* 869 F.Supp. 1031 (W.D.N.Y. 1994); *Washington Petroleum and Supply Co. v. Girard Bank,* 629 F.Supp. 1224 (M.D.Pa. 1983); *Johnson v. Baskerville,* 568 F.Supp. 853 (E.D.Va. 1983); *Cook v. Bates,* 92 F.R.D. 119 (S.D.N.Y. 1981).

Such a conclusion is not a determination on the merits, but involves an inquiry as to whether, even assuming that all of the Complainant's allegations are true, she has stated a cause of action upon which relief can be granted by this Court. In making this inquiry, I have liberally construed the allegations in the Complainant's complaint, and have not held her to the same standard as would be required of an attorney. Nevertheless, I find that the Complainant has failed to allege any facts that would entitle her to relief under the statutes and regulations over which this Court has jurisdiction.

Thus, as discussed above, this Court has no jurisdiction over disputes between unions and members, including the interpretation of collective bargaining agreements, or a union's duty of representation. Nor does this Court have jurisdiction to determine violations of the FAA rules or regulations, or over the activities of the NLRB. This Court has no authority to resolve the Complainant's claim that her civil and constitutional rights were violated.

Except as discussed below, the Complainant has not alleged that she engaged in any activity that could conceivably be considered as "protected activity" under any of the whistleblower statutes on which she relies. Nor has she alleged that she suffered any "adverse employment action" as a result of any protected activity.

The only allegations in the Complainant's complaint that even touch on the elements of a whistleblower claim include her allegation, at paragraph 33 of her Complaint, that she communicated safety concerns to "named persons' In-flight and Safety management," (she does not indicate when she did so) and that she was threatened on January 16, 2004 with a written warning of discipline to her personnel file. However, absent an allegation that she suffered "tangible consequences," such as demotion, such oral criticism, even if discriminatory, is not considered to be actionable adverse action. *See, Daniel v. TIMCO Aviation Services, Inc.,* (ALJ June 11, 2003), and cases cited therein.

Even if the Claimant's allegation that she attempted to schedule a meeting to resolve contractual disputes were deemed to constitute protected activity, a verbal threat of a written warning is not a tangible consequence that could be considered actionable adverse action.

The Complainant also alleges that in December 2003, in retaliation for serving discovery on "named persons' last known counsel," she was assigned to a duty day in violation of her seniority rights. Unfortunately for the Complainant, serving discovery is not "protected activity" under any conceivable interpretation of any of the whistleblower statutes relied on by the Complainant.

Thus, I find that even if the Complainant were to prove every allegation in her complaint, she would not be entitled to relief under the AIR 21 Act, the Sarbanes-Oxley Act, the Comprehensive Environmental Response, Compensation and Liability Act, the Safe Drinking Water Act, the Solid Waste Disposal Act, the Federal Water Pollution Control Act, or the Toxic Substances Control Act.

Accordingly, IT IS HEREBY ORDERED that the Complainant's claim is dismissed for failure to state a claim upon which relief can be granted.

SO ORDERED.

A

LINDA S. CHAPMAN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century; Final Rule, 68 Fed. Reg. 14099 (Mar. 21, 2003).